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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-348

B. V. CLEMONS, L.P.T., *et al.*, *Appellants*,

v.

UNITED STATES OF AMERICA, *et al.*, *Appellees*.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION AND BRIEF OF THE AMERICAN PHYSICAL THERAPY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 42(2), the American Physical Therapy Association ("APTA") moves for leave to file the attached brief as *amicus curiae.**

The nature of APTA's interest in this case is as follows:

(1) Resolution of the constitutional issue presented will directly affect a substantial number of APTA's

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* Appellees consented to the filing of the attached statement and a copy of such consent has been filed with the clerk of the Court. Appellants refused to grant their consent.

members. APTA is the largest association of physical therapists in the United States. Approximately 2,500 of APTA's 19,000 members are independent practitioners of physical therapy. The operation of the statute at question admittedly discriminates against such practitioners by limiting the amount of revenue such practitioners can receive from furnishing physical therapy services to Medicare beneficiaries. The question of whether such discrimination meets constitutional standards is the central question presented in this appeal.

(2) The principal function of APTA is to aid in achieving the delivery of quality physical therapy services to members of the public including Medicare beneficiaries. A principal adverse result of the statute in question is that in many instances it will effectively hamper, if not prohibit, the delivery of physical therapy services to Medicare beneficiaries.

(3) APTA has filed suit in the United States District Court for the District of Columbia challenging the statute at issue in this case and its implementing regulation and guidelines. The constitutional question presented here is also at issue in that action and has been stayed pending the resolution of this appeal.

Accordingly, APTA has a substantial interest in seeking to achieve a proper resolution of the issues presented by the instant case.

As detailed in its statement filed herewith, APTA believes that, if the statute cannot be found on its face to deny equal protection of the laws to Appellants, then proper resolution of the question can be made only after evidentiary proceedings allowing the development of a record which will demonstrate the grave effects resulting from the statute, and regulation and

guidelines implementing it. Because of the timing of the case now before this Court that factual background was never developed. In fact a hearing was never held by the three-judge panel below, and the lack of this factual record was the basis for the dissenting opinion. Resolution of the constitutional question of whether or not the equal protection of the laws has been denied depends, of course, upon whether the discrimination against independent therapists found in the statute is rationally related to a legitimate governmental interest. It is imperative therefore, that the purpose of the statute—and about this there is serious question—be measured against its results and against the primary purpose of the Medicare Act, the delivery of quality health care services to the elderly. APTA believes that because of its position and the factual information it has developed concerning the effects of the statute, the attached brief will be useful to the Court in determining this appeal.

Wherefore, for the foregoing reasons, the American Physical Therapy Association respectfully requests that this Motion for Leave to File an Amicus Brief be granted. Filed herewith is our brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE AMERICAN PHYSICAL THERAPY ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

The American Physical Therapy Association (hereinafter "APTA") respectfully submits this brief as *amicus curiae* because the resolution of the important constitutional questions involved will directly affect the livelihood of many of its members, their ability to continue to provide services to Medicare beneficiaries and the availability of physical therapy services to such beneficiaries.

INTEREST OF THE AMICUS CURIAE [1]

APTA, an Illinois corporation, is an association composed of physical therapists licensed to practice physical therapy in their respective states. With 19,000 members, APTA is the largest organization of professional physical therapists in the United States.

Many of APTA's members are independent practitioners of physical therapy—that is, they practice their profession as independent businessmen and not as employees. Under §§ 1395d and 1395k [2] of the Health Insurance for the Aged Act (hereinafter "the Medicare Act"), Medicare programs cover the furnishing of physical therapy services to eligible beneficiaries. Physical therapy services under Medicare may be performed either by an employee of a hospital, skilled nursing facility or home health agency (defined in § 1395x(u) as "providers" of services) or by an independent practitioner who performs services pursuant to a contractual arrangement with the provider. Such contractual arrangements generally provide for the furnishing of physical therapy services to all of the provider's patients, both Medicare beneficiaries and others. It is currently estimated that there are over 3,000 contractual arrangements between providers and independent physical therapists under which approximately 45,000 patients are treated per day.[3]

The continued viability of such independent physical therapists and the continued availability of the services

[1] This brief is filed pursuant to Supreme Court Rule 42(1)&(2).

[2] All section references herein are to the Act as codified in Title 42 of the United States Code.

[3] These figures were developed by APTA from the Bureau of Labor Statistics Hospital Industry Wage Survey (August, 1972) and APTA's Income Survey of Membership, 1974.

they provide to Medicare beneficiaries as well as other patients is directly threatened by § 1395x(v)(5)(A) of the Medicare Act. As a result, on March 21, 1975, APTA filed suit in the District Court for the District of Columbia challenging the constitutionality of § 1395 x(v)(5)(A) (hereinafter referred to as the "salary equivalence statute") and the validity of its implementing regulation and guidelines. *American Physical Therapy Association* v. *Weinberger, et al.*, Civil No. 75-0396. The constitutional issue has been stayed by a three-judge court pending the outcome of this appeal.

THE STATUTE INVOLVED

In 1972 Congress amended the Medicare Act by adding § 1395x(v)(5)(A), which provides in relevant part:

> "Where physical therapy services, occupational therapy services, speech therapy services, or other therapy services or services of other health-related personnel (other than physicians) are furnished under an arrangement with a provider of services or other organization, . . . the amount included in any payment to such provider or other organization under this subchapter as the reasonable cost of such services . . . shall not exceed an amount equal to the salary which would reasonably have been paid for such services (together with any additional costs that would have been incurred by the provider or other organization) to the person performing them if they had been performed in an employment relationship with such provider or other organization . . . plus the cost of such other expenses . . . incurred by such person. . . ." [4]

[4] Social Security Act Amendments of 1972, Pub. L. No. 92-603, § 251(c).

In implementing the statute, the Secretary of Health, Education and Welfare promulgated a salary equivalence regulation and a "Schedule of Guidelines for Physical Therapy Services Furnished Under Arrangements" (hereinafter "guidelines") (40 Fed. Reg. 5760-62 and 5810 (Feb. 7, 1975)). The regulation and guidelines, in effect, limit payment to independent physical therapists under a formula based upon the 75th percentile of hourly salary rates paid by providers in an "appropriate" geographical area[5] increased by a fringe benefit and expense factor and travel allowance.

The discriminatory nature of § 1395x(v)(5)(A) and the regulation and guidelines adopted thereunder result in the following:[6]

(1) The salary equivalence statute and implementing regulation place a ceiling on the revenues which independent practitioners can derive from serving Medicare beneficiaries since providers will agree to pay the practitioner only an amount equal to that which such providers will be reimbursed by Medicare, with the result that many therapists will have to operate at a loss to continue serving Medicare beneficiaries.

(2) Some physical therapists have already been forced to cease furnishing services to providers under contractual arrangements.

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[5] The wage survey employed by the Secretary was the Hospital Industry Wage Survey compiled by the Bureau of Labor Statistics in 1972. This survey covers 21 of the 269 Standard Metropolitan Statistical Areas ("SMSA") in the United States. Wage rates computed from a single SMSA were applied to as many as six different states in establishing salary equivalence under the guidelines.

[6] Evidence as to all of the results described below has been introduced in the District Court for the District of Columbia in *American Physical Therapy Association* v. *Weinberger, et al.*

(3) Many providers have cancelled contracts with independent physical therapists because of the limitation on reimbursements contained in the Act and regulation.

(4) Some providers are now in a position of being unable to furnish physical therapy services to Medicare beneficiaries.

SUMMARY OF APTA'S POSITION

The issues presented by this case are substantial:

(1) For the first time this Court is presented with the question of the constitutionality of the Medicare Act's admittedly discriminatory treatment of independent practitioners of therapy services with respect to payment for services rendered to Medicare beneficiaries.

(2) To sustain such discrimination the government must demonstrate that, at the least, it is rationally related to a legitimate governmental interest. As the dissenting opinion below points out, the government completely failed to demonstrate such a relationship. Accordingly, APTA respectfully submits that the decision below must be reversed.

(3) Because of the far-reaching importance of the Court's decision—this decision could set a precedent that would be ultimately controlling with respect to the method used by the government in reimbursing all professionals and nonprofessionals who provide services to Medicare beneficiaries—this case should not be summarily affirmed. If the unconstitutionality of the discrimination is not clear on the face of the statute and regulation, the case should be remanded for proceedings which will develop a record

demonstrating in detail the operation of the statute, its implementing regulation and guidelines, and their effect on therapists, providers and beneficiaries. As explained subsequently and as recognized in the dissenting opinion below, because of the timing of this action relative to the development and publication of the regulation and guidelines such information was not before the three-judge panel.

ARGUMENT

I. The Statute on Its Face Denies the Equal Protection of the Laws.

Under traditional equal protection standards, applicable to federal legislation by virtue of the Due Process Clause of the Fifth Amendment, a discriminatory legislative classification may be sustained only if it is "rationally related to a legitimate governmental interest."[7] Where assumptions underlying legislative discrimination are wholly unsubstantiated, or evidence is lacking to support such assumptions, the statutory provision creating such discrimination must be held

[7] The irrationality of the discriminatory classification established by the statute is demonstrated by the following example. An independent contractor has furnished physical therapy services to a hospital for years and the hospital-provider has continually received reimbursement for the actual cost of such services under the "reasonable cost" formula which is even now applicable to all therapists except those that are independent contractors. Because of the statute and regulation, the provider will now be reimbursed only in an amount determined by the salary equivalence formula, even if such amount is less than the actual cost incurred by the therapist. However, if the therapist gives up his role as an independent contractor and becomes an employee of the hospital the amount which could be reimbursed would once again be the actual cost of providing the service. In other words, what is *reasonable cost for services performed by an employee is unreasonable for exactly the same services performed by an independent contractor.*

invalid. See *United States Department of Agriculture* v. *Moreno,* 413 U.S. 528 (1973); *James* v. *Strange,* 407 U.S. 128 (1972); *Reed* v. *Reed,* 404 U.S. 71 (1971).

With regard to the salary equivalence statute the only attempt in the court below to define the assumption underlying the discriminatory classification was the government's claim that such classification will result in cost savings. Apparently the majority of the three-judge panel adopted that assumption. That reasoning is flawed in two respects. First, to paraphrase *Moreno,* the assumption that cost savings will ultimately result from the discriminatory classification is totally unsubstantiated by the record.[8] Second, assuming *arguendo* that the statute might achieve some reductions in Medicare costs, the record fails to explain how restricting the scope of this salary equivalence (presumably cost saving) formula to include only independent physical therapists rather than all physical therapists will further the legislative goal.

This failure to explain the dissimilar treatment of persons similarly situated is the basis of Judge Duncan's compelling dissent in *Clemons.* Judge Duncan stated:

> "There are no facts before us which would indicate a rationale for the continued statutory approval of a 'reasonableness' ceiling for services

[8] In fact, contrary to this assumption, Judge Duncan noted in his dissent below:

> "[T]he only evidence of record which sheds light on the relative costs to the medicare system of independent *vis a vis* in-house therapy services is the affidavit of one of the plaintiffs, averring that charges for services by independents are in some instances less than those of in-house therapists."
>
> Jurisdictional Statement at 13a.

> performed in-house and the challenged statutory disapproval of a 'reasonableness' standard for services performed by independents." Jurisdictional Statement at 13a.

Indeed, Judge Duncan in his dissent recognized two results that allegedly would flow from the statute which, if ultimately proved, might require the finding that there is no rational relationship between the discrimination and a legitimate legislative purpose. They are the allegations that (1) the costs of independent physical therapists under Medicare have been in some instances lower than those for in-house therapists and (2) that the statute's ultimate result would be to drive independent physical therapists out of business.

With respect to the first allegation Judge Duncan concluded:

> "Since I can find no basis, on the factual posture in which this case now stands, for an inference that the services of independents are inferior, more expensive, undesirable or unnecessary, I cannot identify the rational basis upon which Congress has acted to treat plaintiffs differently from their cousins, providers with in-house therapy employees." Jurisdictional Statement at 14a.

As to the second allegation he concluded:

> "I would think that if the effect of the legislation would be as the plaintiffs allege, [*i.e.*, drive some independent therapists out of business] it would not be rationally related to the Congressional goal of continuing to provide medicare coverage for the services of independents, albeit with a fee ceiling imposed." Jurisdictional Statement at 14a.

In light of the government's total failure to come forward with evidence justifying the discrimination,

and based on the record below, APTA respectfully submits that the statute places independent and employee therapists into separate classes "on the basis of criteria wholly unrelated to the objective of [the] statute." *See Reed* v. *Reed,* 404 U.S. 71, 75 (1971). Accordingly, the statute should be declared unconstitutional.[9]

II. If the Salary Equivalence Statute Does Not on Its Face Deny Equal Protection of the Laws, This Court Should Vacate the Judgment Below and Remand the Case to the District Court for Further Evidentiary Proceedings.

If the unconstitutionality of the statute is not apparent on its face, this case should be remanded to the District Court to allow a thorough examination of the operation of the statute in the context of the implementing regulation and guidelines and the effects such operation will have on therapists, providers, and beneficiaries. Such effects, which can now be shown as fact rather than conjecture, have in many instances been crucial to this Court in deciding equal protection

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[9] The asserted legislative purpose in reducing Medicare costs might be interpreted to include an intent to prevent fraudulent payment claims under Medicare. But under this approach, because the salary equivalence statute does not extend to in-house therapists or their providers, it must be struck down as under-inclusive. By the same token, because the statute encompasses independent therapists who have never abused the previous system of payments under the Medicare program the statute should also be invalidated because it is overly broad. *See e.g., United States Department of Agriculture* v. *Moreno,* 413 U.S. at 535-36, (rejecting the government's contention that the broad ban against unrelated household participation in the food stamp program was a rational effort to deal with the concern over fraud and abuse), and *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974) (striking down an overly broad statute precluding the payment of social security benefits to all members of a certain class of illegitimate children regardless of need because of Congressional concern over fraudulent claims).

cases. *See e.g., United States Department of Agriculture* v. *Moreno,* 413 U.S. at 531-32; *Humphrey* v. *Cady,* 405 U.S. 504 (1972); and *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975). The ultimate results generated by a discriminatory classification are essential in judging whether the classification is rationally related to a legitimate government purpose. If the government can prove that the purpose of the 1972 amendments is cost savings or the prevention of abuse, the effects generated by the discriminatory classification will materially aid, in fact are essential, in determining whether the statutory purpose is furthered by placing a limitation on the earnings of only independent physical therapists. In that regard, the purpose of the salary equivalence amendment and the effects generated by that amendment must be measured against the principal purpose of the statute—providing quality medical services to eligible Medicare beneficiaries.

The reason that the effects generated by the statute, regulation, and guidelines are not available in the record below is solely a result of the timing of the action relative to the promulgation of the final regulation and guidelines. Plaintiffs filed this action on December 28, 1973. It was not until five months later, on May 28, 1974, that the Department of Health, Education and Welfare first proposed an implementing regulation. (*See* 39 Fed. Reg. 18467-69).

The proposed regulation merely tracked the language of the enabling statute, providing that the "reasonable cost" of physical and other therapy services under arrangements with a provider of services "shall not exceed an amount equivalent to the prevailing

salary and additional costs that would reasonably have been payable by the provider . . . had such services been performed by such person in an employment relationship, plus the cost of other expenses incurred by such person in furnishing services under such an arrangement." (*Id.* at 18468).

The proposed regulation announced that an unspecified "fringe benefit and expense factor" would be included in an unspecified "prevailing salary" figure and that an unspecified "travel allowance" would also be provided. No ranges or estimates of figures were given for the foregoing categories. Rather the proposed regulation announced that it would itself be implemented "by means of separate guidelines" to be promulgated separately for physical and other therapy services.

Thus, even after May 28, 1974 the plaintiffs, faced with an abstract legislative formula and an equally vague proposed "implementing" regulation, were unable to inform the court in precise factual terms on the critical question concerning the harm which would be visited upon them or other physical therapists. Perhaps of equal importance, the court did not have before it facts relating to the effect this statute would have on providers of services, particularly in sparsely populated regions, or to Medicare beneficiaries. It was not until February 7, 1975, that HEW promulgated a final salary equivalence regulation and, more importantly, a "Schedule of Guidelines for Physical Therapy Services Furnished Under Arrangements." (*See* 40 Fed. Reg. 5760-62 and 5810). Despite efforts of Appellant after that date to obtain a hearing on its previously filed motions for a temporary restraining order

and preliminary injunction, where the issue of irreparable harm would have by necessity been carefully considered by the court, no hearing was held and as Judge Duncan points out, the important constitutional questions involved were decided without the benefit of a complete factual record.

It was the guidelines, published in February 1975, which for the first time placed dollar and cents figures on reimbursable amounts under the statute. It was only these figures which drew the harmful impact of the statute into sharper focus. Following this publication, the detrimental impact of the regulation on independent physical therapists, providers of services, and Medicare beneficiaries became factually demonstrable. In several instances contractual arrangements were immediately cancelled by providers who would agree to pay therapists only an amount equal to what they would be reimbursed by Medicare. In other instances, rather than cancel arrangements, providers have forced independent physical therapists to modify their arrangements to limit payment to an amount not to exceed the salary equivalence amount. Since arrangements between providers and independent therapists generally apply to services furnished to both Medicare patients and others, the injurious effect is multiplied.

Other instances demonstrate that some providers, following implementation of the regulation and guidelines, may not be able to afford to hire in-house physical therapists in the event that independent practitioners decline to renegotiate their contractual arrangements. This would be especially true in rural areas where there is no need for full-time physical therapists. This result, if proved, would surely defeat the

fundamental purpose of the Medicare Act in providing health care for the elderly.[10]

APTA respectfully submits that, if it is not clear that the statute is unconstitutional on its face, evidence going to the effects outlined above must be before the trial court before independent physical therapists have had their day in court.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Southern District of Ohio should be reversed or vacated and remanded for further proceedings.

Respectfully submitted,

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[10] As pointed out in Appellants' Jurisdictional Statement, the ability of corporate providers to obtain employee physical therapists if independent contractors must cease furnishing services is, in some instances, highly doubtful because of state licensure requirements. APTA is aware of situations other than Ohio where, for instance, a corporate proprietary hospital could not employ a physical therapist to furnish services to its patients without engaging in the unauthorized practice of physical therapy under state law.